United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 18,760

CLIFTON HAIRSTON,

APPELLANT

v.

UNITED STATES OF AMERICA,

APPELLEE

A863

APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

FERDINAND J. MACK
Attorney for Appellant
Appointed by the
United States Court of
Appeals for the District
of Columbia Circuit

QUESTION PRESENTED

Whether the fact that appellant darted across a main thoroughfare between intersections, during a snow storm, at night, to accept an auto ride from a friend who had hailed him, justified the trial court in instructing the jury as to flight by the defendant from the scene of an alleged crime committed three blocks away.

INDEX

TABLE OF CASES

STATUTES CITED

MISCELLANEOUS

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,760

CLIFTON HAIRSTON,

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction of the appellant on a one count indictment charging violation of Section 22-501 (Assault With Intent To Commit Rape) of the District of Columbia Code (1961 Edition). The judgment appealed from was entered by the United States District Court for the District of Columbia following a jury verdict of guilty as charged. This Court has jurisdiction by virtue of 28 U.S.C. § 1291.

STATEMENT OF THE CASE

Shortly before 2:00 o'clock a.m. on the morning of January 15, 1964, the complaining witness, Stella Louise Tate, left a dance at the Capitol Arena located at 14th and W Streets, N.W., Washington, District of Columbia. (Tr. 3, 10, 28) Shortly before leaving, it was agreed between Anthony Savoy and Miss Tate that Savoy would drive her home in his car. (Tr. 6) Outside the Arena, Miss Tate was forced into Savoy's automobile by two boys. (Tr. 7) The car, containing Miss Tate and those two boys in the rear, and appellant and Savoy in the front, was driven by Savoy to 8th Street between Barry and V Streets, N.W., Washington, District of Columbia. There the complaining witness and the two boys got out of the rear of the car. (Tr. 8, 73) At the corner of 8th and V Streets, N.W., Washington, District of Columbia, appellant got out of the car. (Tr. 74-75) The driver of the car then hailed a patrol wagon at 7th Street and Florida Avenue, N.W. After traveling to 8th Street, south of Barry, one of the police officers, after hearing screams, opened the door of a parked truck, and saw a male person on top of the complaining witness. (Tr. 104, 106-108, 110) That person ran away, heading north on 8th Street. While rounding the truck, the police officer fell in the snow and gave up pursuit. (Tr. 109, 110)

James H. March left the dance at Capitol Arena at about 3:00 o'clock, and approximately one-half hour later, was traveling in a northerly direction on Georgia Avenue. (Tr. 131, 140, 145) He observed Clifton Hairston, whom he knew, running in the same direction on the West side of the street. (Tr. 134, 145) He asked appellant if he wanted a lift, at which time appellant was observed by the police officer to "dart across the street" and appellant got into the back seat of March's car. (Tr. 125, 143, 144) It had been snowing that evening and it was apparently still snowing when appellant crossed Georgia Avenue. (Tr. 105) The defendant offered evidence tending to show that he was not present at the time and place of the alleged offense, and the Court instructed the jury on the defense of alibi. (Tr. 255) Appellant was identified by the police officer who first came on the scene and the complaining witness as the assailant of the complaining witness. (Tr. 18-19) At the conclusion of all the evidence, the trial court instructed the jury as follows:

> "Now, the Government also has referred to flight and has referred to the fact that the defendant was seen running at the time he went over to the car of the witness March, and soon after was arrested by the policeman Dollard.
>
> "Now, he contends that he was not fleeing at all, was on his way home, having left the two girls at Seventh and Florida Avenue, where they got cabs.

"Now, flight alone, if you find there was flight, and as I say, there is a dispute about that, is not significant unless you find that the flight showed a consciousness of guilt.

"Of course, Officer Dickson contends he fled when he came upon the scene at the abondoned truck. The defendant claims he was not the man.

"However, flight, if you find it, is a circumstance to be weighed and considered in connection with other proof with that caution and circumspection which its inconclusiveness when standing alone requires.

"Flight may show a consciousness of guilt, if you find it, but on the other hand, it may merely exhibit a state of mind of an innocent man who would rather attempt to save himself by fleeing rather than standing trial. Or it may be the act of a man who flees out of fear or flees thoughtlessly.

"Flight of an accused is competent evidence, but it is not conclusive standing alone nor does it create any consciousness of guilt, nor does it create any presumption of guilt.

"But it is a circumstance, as I say, from which you are entitled to draw such reasonable inference as you believe it merits." (Tr. 247-248) (Emphasis added)

No objection to this instruction was noted by appellant's trial attorney. The jury returned a verdict of guilty. (Tr. 258)

STATEMENT OF POINTS

There was no evidence of flight and it was clear error under those circumstances to give an instruction of flight. (The appellant requests the Court to read, in connection with this point, the following portions of the reporter's transcript: Tr. 106-110, 124-125, 133-135, 247-248.)

SUMMARY OF ARGUMENT

Where within an hour after an alleged assault, a person is observed, three blocks from the scene of the alleged offense, to dart across a heavily traveled thoroughfare, in the early hours of the morning and during a snow storm, those facts do not, as a matter of law, constitute flight, and an instruction as to flight predicated on those facts is improper. The Government's evidence, uncontradicted, is that appellant's only reason for "darting across the street" was to secure an auto ride on a snowy night. In order to justify the instruction of flight, the evidence must show that the accused "fled from the scene of an actual or supposed crime." Wong Sun v. United States, 371 U.S. 471, 483 (1963). If crossing the street under the circumstances of this case can constitute flight,

the instruction should be given in all criminal cases where the defendant is not immediately apprehended at the scene of the crime. If crossing a busy street to get in a car on a snowy night is flight, so is going to the corner grocery store to buy a pack of cigarettes, traveling to home or to work, going to school, or any other activity which requires motion.

ARGUMENT

The perpetrator of the crime with which appellant was charged and convicted fled from the scene of the crime. Although identified by the complaining witness and an investigating police officer as the person who committed the offense and fled from the scene, appellant offered evidence showing that he could not have been at the scene of the crime. Under these facts, an instruction as to the effect of flight was not only unnecessary but improper. If the jury believed the identification by the complaining witness and the police officer, to instruct on the significance of flight from the scene of the attack was superfluous, for their was no defense made of consent, or any other defense which admitted appellant's presence at the scene. Consequently, the reference by the trial court in its instruction as to flight to the testimony of the

investigating officer who said he saw appellant flee from the abandoned truck could only serve to confuse the jury, for as given, the instruction inferred that the fact that someone fled from the abandoned truck tended to prove that appellant was guilty of the offense charged.

The Court also predicated its instruction as to flight upon the testimony of the arresting officer "that the defendant was seen running at the time he went over to the car of the witness March". These actions of the accused occurred prior to the time the police made their presence known; during a snow storm; as appellant was crossing Georgia Avenue, a main thoroughfare in this City; apparently in the dark hours of the night; and at a point about three blocks from the scene of the offense. When apprehended in his friend's car, appellant offered no resistence and demonstrated no conduct inconsistent with innocence. These facts taken in a light most favorable to the Government do not add up to evidence of flight, and it was error to give the instruction on flight.

> "The fact that a crime is committed on a certain date by a person whose identity is unknown, and that subsequently an individual is taken into custody and charged with the previously committed crime, affords no basis, of itself and in view of that individuals denial of identity with the person who committed the crime of which he stands accused, for a charge covering flight. The Court's

statement that the accused 'did flee the scene and was not apprehended until five months later' was apparently based on the assumption that the defendant is in fact the person who committed the crime - yet that question had not yet been submitted for determination by the jury. * * *

"In a criminal case it is error to give an instruction which is not applicable to the crime charged and which is not borne out by the evidence. The rule obtains that it is only where there is evidence of flight that the jury may be instructed properly to consider such flight as a circumstance tending to prove guilt in connection with other circumstances in evidence, but where there is no evidence of flight, it is error to instruct thereon. In the instant case, in view of the absence of evidence showing any attempt, effort, or purpose on the part of the defendant to flee, the Court's instruction was highly prejudicial and sufficient in itself to cause a reversal, since the jury might well have concluded that the defendant must have fled from justice - else the Court would not have charged them on flight." State v. Hills, 241 La. 345, 129 S.2d 12, 33.

The varying circumstances which may constitute evidence of flight make difficult a simple definition of that simple term. However, flight for the purposes of this appeal does not include escape from custody, resistance to arrest, concealment or assumption of a false name, which also permit an instruction as to the inference of guilt flowing from such conduct of an accused. Wigmore on Evidence, 3rd Edition, § 276. The only possible basis for instructing as to flight in this case is that appellant "fled from the scene from an actual or supposed crime." Wong Sun v. United States, 371

U.S. 471, 483 (1963) The question to be determined on this appeal is whether rapid movement of an accused, three blocks from the scene of an alleged offense, under circumstances which make those actions of the accused not only logical, but imperative, are such as to permit a jury to attach an inference of guilt thereto. If the actions of this appellant constitute evidence of flight, the actions of any accused found walking, driving, riding a bus, or in any other way moving in or about the general area of an offense, would furnish evidence of flight. Such a result would be contrary to reason, and would permit an inference of guilt to arise out of conduct which is on its face innocuous. It does not suffice to suggest that the defendant may explain the reasons for his actions; for this requires the defendant to testify, and as in this case, he may not desire to do so. To require the defendant to explain away such innocuous conduct is to cast on him the burden of proving his innocence.

The evidence of appellant's conduct in this case should have been evaluated by the trial court to determine if there was a basis upon which reasonable minds could conclude that appellant was in flight. In measuring appellant's conduct, the language of the Court in People v. Herbert, 361 Ill. 64, 196 N.E. 821, 825 would appear to furnish as good a standard as any against which to measure that conduct.

> "Flight, in criminal law, is defined as 'the evading of the course of justice by voluntarily withdrawing oneself in order to avoid arrest or detention, or the institution or continuance of criminal proceedings.' The term signifies, in legal parlance, not merely a leaving, but a leaving or concealment under 'consciousness of guilt and for the purpose of evading arrest.'"

The conduct of appellant fails to meet the test laid down in People v. Herbert, and it furnished no basis for an instruction as to flight.

The instruction of the trial court as to flight was not objected to by appellant's trial counsel after the jury was charged. The record does not show what objections, if any, were made to the instructions before they were given. It is true that the failure to object after the instruction was given does require that, for reversal, the errors of the trial court be 'plain errors or defects affecting substantial rights', Rule 52(b), Fed.R.Crim.P. 18 U.S.C.A. However, the damaging effect of instructing a jury as to flight where there was no evidence of flight could not have been cured in that trial, in any event:

> "The Court's instruction was highly prejudicial and sufficient in itself to cause a reversal, since the jury might well have concluded that the defendant must have fled from justice - else the Court would not have charged them on flight." State v. Hills, 241 La. 345, 29 S.2d 12, 33.

As this Court said in Payton v. United States, 96 U.S.App.D.C. 1, 222 F.2d 794, 797:

> "The absence of objections ordinarily relieves an appellate court of the necessity of noticing errors, but it does not preclude the court from doing so."

Had the erroneous instruction of the Court been called to its attention prior to the time the jury began its deliberations, that jury would not have been permitted to deliberate on the guilt or innocence of defendant. A mistrial would have been declared, and a new panel drawn to retry the case. By this appeal, this is all that appellant seeks - a new trial, and the ends of justice will be served by noticing the error of the trial court at this late date.

CONCLUSION

For the reason set forth above, the appellant requests the judgment of the United States District Court for the District of Columbia be reversed, and that this case be remanded to that Court for a new trial.

Respectfully submitted,

FERDINAND J. MACK
Attorney for Appellant
Appointed by the United
States Court of Appeals
for the District of
Columbia Circuit

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,769

CLIFTON HAIRSTON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

DAVID C. ACHESON,
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FRANK Q. NEBEKER,
ROBERT X. PERRY,
GERALD E. GILBERT,
Assistant United States Attorneys.

INDEX

TABLE OF CASES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,760

CLIFTON HAIRSTON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was charged with assault with intent to commit rape in an indictment filed February 24, 1964. Trial by jury commenced May 7, 1964 and a verdict of guilty was returned May 11, 1964. By judgment and commitment filed June 26, 1964, appellant was sentenced to four to twelve years imprisonment. The trial court granted leave to appeal in *forma pauperis*.

The government's evidence was clear and strong. It showed that Miss Stella Tate, the 16 year old complainant, had gone to a dance on the evening of January 12, 1964 (Tr. 4-5). As she was leaving the dance two boys

whom she did not know grabbed her and forced her into the back seat of a car (Tr. 7). She was crying and screaming trying to get out and the boys held her hands and hit her. She then saw Mr. Anthony Savoy in the driver's seat of the car (Tr. 8). Miss Tate had earlier made arrangements for Mr. Savoy to take her home after the dance (Tr. 6, 66). When Mr. Savoy got into car he saw Miss Tate in the back seat with the two boys (Tr. 68). The appellant also got into the car on the passenger's side of the front seat (Tr. 8, 69). Mr. Savoy drove away and told the boys he would drop them off at 9th and V Streets, N.W. (Tr. 70). Miss Tate kept trying to get out but she was still being held and then the appellant also hit her (Tr. 12). It was snowing heavily and Mr. Savoy did not look around inside the car because he was paying attention to his driving. But he heard a smack like someone being hit and he heard Miss Tate crying (Tr. 71). After they had gone about a half of a mile the boys told Savoy to stop. Miss Tate was crying and asked Savoy to help her. She told Savoy to take her home and not to let the boys take her out of the car, but Savoy told her there was nothing he could do. The two boys in the back seat forced Miss Tate out of the car and down the street to an abandoned truck. Savoy and the appellant remained in the car and Savoy drove down the street about a block and a half where appellant got out. (Tr. 13-14, 73.)

At the truck one of the boys pushed Miss Tate into the cab and tried to pull her panties down. The boy was hitting her and she was hitting back. Her panties were not all the way down when the appellant arrived (Tr. 15). The appellant entered the cab of the truck and the other boy left. Miss Tate started to get up and the appellant pushed her back down and hit her. He unzipped his pants, exposed himself and lay on top of her. He got her panties down. (Tr. 16.) They were hitting each other when the appellant suddenly left. She looked up and saw a police wagon. (Tr. 17). There was a street light shining into the cab and she saw the appellant,

whom she had just been with in the car a few minutes before, very clearly (Tr. 18).

After Anthony Savoy had let the appellant out of the car, Savoy went to a patrol wagon and told Private Walter Dickson what had happened (Tr. 76, 104-105). Officer Dickson and his partner proceeded immediately to the abandoned truck. When they got near the truck Officer Dickson heard a woman's screams coming from the truck. Officer Dickson jumped out of the patrol wagon and ran over to the driver's side of the truck. He jerked open the door. (Tr. 107). Officer Dickson saw Miss Tate on her back, with her head toward him and her legs extended out the other door. She was prostrate, her dress above her waist and her pants pulled down. The appellant was kneeling down over her. She appeared to be in a state of shock or like somebody having a seizure. She was babbling and screaming. (Tr. 108.) As Officer Dickson opened the door the appellant started to back out the other side. Officer Dickson hollered for the appellant to halt, but the appellant kept going. Appellant started to run north on 8th Street. Officer Dickson ran around the truck and slipped and fell on the snow. Officer Dickson again hollered for appellant to stop. Dickson then pulled out his service revolver and fired three shots at different intervals, but appellant did not stop. (Tr. 109.) Dickson got a good look at the appellant inside the well lighted cab (Tr. 110). Officer Dickson returned to his patrol wagon, called an ambulance and flashed a lookout for the appellant (Tr. 111). Shortly thereafter Sergeant Robert Dollard, after receiving the lookout, spotted the appellant as he darted across the street into a car. Officer Dollard stopped the car and arrested the appellant (Tr. 124-127). The driver of the car was James March, a friend of the appellant's, who had called to the appellant when he saw him running down Georgia Avenue (Tr. 134-135). Officer Dickson arrived at the place where appellant was arrested and recognized him immediately (Tr. 112-113). The appellant was then returned to the scene of the crime just a few blocks away where Miss

Tate and Mr. Savoy were waiting (Tr. 125-127). When Miss Tate saw the appellant she started to shake, and threw up her hands and backed away (Tr. 78, 114). Miss Tate was nervous and in a state of shock. Her eyes were watering, and she had a bruised lip and a swollen eye. (Tr. 152.)

STATUTE AND RULE INVOLVED

Title 22, District of Columbia Code, Section 501 provides:

> Every person convicted of any assault with intent to kill or to commit rape, or to commit robbery, or mingling poison with food, drink, or medicine with intent to kill, or wilfully poisoning any well, spring, or cistern of water, shall be sentenced to imprisonment for not more than fifteen years.

Rule 30, Federal Rules of Criminal Procedure, 18 U.S.C., provides:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

SUMMARY OF ARGUMENT

The complainant, a 16 year old girl, was beaten by the appellant in the cab of an abandoned truck. He pulled

her panties down, exposed himself, and lay on top of her. The complainant was fighting with him and screaming. A police officer who had been informed that the complainant had been forced out of a car in the vicinity of the abandoned truck, was proceeding to the truck when he heard the complainant's screams. The officer opened the door of the truck and saw the appellant kneeling over the complainant who was babbling and screaming. The appellant backed out the other side and started to run. The officer twice called to the appellant to halt, and fired three shots from his service revolver, but the appellant kept going. The officer had seen the appellant very clearly and flashed a lookout for him. Appellant was arrested a short time later just a few blocks from the scene of the crime by an officer who had received the lookout and saw the appellant dart across the street.

Flight of an accused may be considered by a jury as having a tendency to establish guilt. There is no question that the facts of this case were appropriate for a flight instruction, and it is not surprising that there was no objection when such an instruction was given. The instruction clearly was proper and fair. The evidence against the appellant was overwhelming and he fails to show harmless error much less reversible error.

ARGUMENT

It was proper for the court to instruct the jury concerning the appellant's flight.

(See Tr. 12-14, 15-17, 71-73, 76, 104-105, 107-113, 124-127, 134-135, 247-248)

The Government's evidence showed that the complainant, Miss Stella Tate, a 16 year old girl, was beaten by two boys and the appellant while riding in a car driven by Mr. Anthony Savoy. The two boys forced Miss Tate out of the car and into the cab of an abandoned truck (Tr. 12-14, 71-73). In the truck Miss Tate was again

beaten by the appellant who pulled her panties down, exposed himself, and lay on top of her (Tr. 15-17). Private Walter Dickson who had been informed by Mr. Savoy of what was happening to Miss Tate, proceeded immediately to the abandoned truck (Tr. 76, 104-105). As he arrived near the truck officer Dickson heard Miss Tate's screams. He ran to the truck and opened the door (Tr. 107). He saw Miss Tate lying on her back, with her pants down and her dress up over her waist. She was babbling and screaming and appeared to be in a state of shock. (Tr. 108).

The appellant was kneeling over Miss Tate and he started to back out the other side of the truck. Officer Dickson told the appellant to halt but the appellant kept going, and started to run. Officer Dickson ran around the truck but slipped and fell on the snow. He again called to the appellant to stop, and then fired three shots at different intervals with his service revolver, but the appellant never stopped. (Tr. 109). Officer Dickson got a good look at the appellant inside the well lighted cab (Tr. 110), and he flashed a lookout for him immediately (Tr. 111). Shortly thereafter Sergeant Robert Dollard, after receiving the lookout for appellant, spotted him a few blocks from the scene of the crime as he darted across the street and got into a car. Sergeant Dollard stopped the car and arrested the appellant. (Tr. 124-127). James March, the driver of the car and a friend of the appellant's, had called to the appellant when he saw him running down Georgia Avenue (Tr. 134-135).

Within a few minutes of appellant's arrest, Officer Dickson arrived at the place where appellant was arrested and recognized him immediately (Tr. 112-113). The appellant was then returned to the scene of the crime where Miss Tate and Mr. Savoy were waiting (Tr. 125-127).

At the close of the trial the court gave the following instruction to which there was no objection:

> Now, the Government also has referred to flight and has referred to the fact that the defendant was

seen running at the time he went over to the car of the witness March, and soon after was arrested by the policeman Dollard.

Now, he contends that he was not fleeing at all, was on his way home, having left the two girls at Seventh and Florida Avenue, where they got cabs.

Now, flight alone, if you find there was flight, and as I say, there is a dispute about that, is not significant unless you find that the flight showed a consciousness of guilt.

Of course, Officer Dickson contends he fled when he came upon the scene at the abandoned truck. The defendant claims he was not the man.

However, flight, if you find it, is a circumstance to be weighed and considered in connection with other proof with that caution and circumspection which its inconclusiveness when standing alone requires.

Flight may show a consciousness of guilt, if you find it, but on the other hand, it may merely exhibit a state of mind of an innocent man who would rather attempt to save himself by fleeing rather than standing trial. Or it may be the act of a man who flees out of fear or flees thoughtlessly.

Flight of an accused is competent evidence, but it is not conclusive standing alone nor does it create any consciousness of guilt, nor does it create any presumption of guilt.

But it is a circumstance, as I say, from which you are entitled to draw such reasonable inference as you believe it merits. (Tr. 247-248).

Appellant now for the first time contends that a flight instruction should not have been given. Appellee submits that appellant's contention is totally lacking in merit. It is difficult to conceive of a factual situation any more appropriate for a flight instruction than the one in the instant case. The law is entirely well settled that the flight of an accused may be considered by the jury as having a tendency to establish his guilt. *Allen* v. *United States*, 164 U.S. 492, 499 (1896); *Edmonds* v. *United States*, 106 U.S. App. D.C. 373, 273 F.2d 108 (1959),

cert. denied, 362 U.S. 977 (1960); *Green* v. *United States*, 104 U.S. App. D.C. 23, 259 F.2d 180 (1958). Furthermore it is evident from the instruction itself that the form of the instruction was fair to the appellant. *Miller* v. *United States*, 116 U.S. App. D.C. 45, 320 F.2d 767 (1963), *Hunt* v. *United States*, 115 U.S. App. D.C. 1, 316 F.2d 652 (1963).

In any event, there was no objection to any part of the instruction and appellant is foreclosed from even raising the issue on appeal. Rule 30 F.R. Crim. P.; *Ruffin* v. *United States*, 106 U.S. App. D.C. 87, 269 F.2d 544, *cert. denied*, 361 U.S. 865 (1959); *Moore* v. *United States*, 104 U.S. App. D.C. 327, 262 F.2d 216 (1958), *cert. denied*, 359 U.S. 959.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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